RECORD AND BRIEFS

Supreme Court U.S.
FILED
MAY 16 2016
OFFICE OF THE CLERK

No. 15-457

# In the Supreme Court of the United States

MICROSOFT CORPORATION, PETITIONER

*v.*

SETH BAKER, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR RESPONDENTS

BRENDAN S. MAHER
*Counsel of Record*
DANIEL L. GEYSER
DOUGLAS D. GEYSER
Stris & Maher LLP
6688 N. Central Expy., Ste. 1650
Dallas, TX 75206
(213) 995-6805
*brendan.maher@strismaher.com*

PETER K. STRIS
RADHA A. PATHAK
DANA BERKOWITZ
VICTOR O'CONNELL
THOMAS E. LOGAN
Stris & Maher LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017

DARREN T. KAPLAN
Stueve Siegel Hanson LLP
1359 Broadway, Ste. 2001
New York, NY 10018

MARK A. GRIFFIN
AMY WILLIAMS-DERRY
BENJAMIN GOULD
Keller Rohrback LLP
1201 Third Ave., Ste. 3200
Seattle, WA 98101

*Counsel for Respondents*

*(Additional counsel listed on signature page)*

## QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under both 28 U.S.C. 1291 and Article III to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice.

## PARTIES TO THE PROCEEDINGS

Petitioner is Microsoft Corporation.

Respondents are Seth Baker, Matthew Danzig, James Jarrett, Nathan Marlow, and Mark Risk. Those individuals were also named plaintiffs below, along with Jesse Bernstein, who dismissed his appeal and is not a respondent here.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDINGS ..... ii

TABLE OF AUTHORITIES ..... v

INTRODUCTION ..... 1

STATEMENT OF THE CASE ..... 3

A. Statutory Background ..... 3

B. Facts and Procedural History ..... 9

SUMMARY OF ARGUMENT ..... 17

ARGUMENT ..... 22

I. RESPONDENTS' VOLUNTARY DISMISSAL WITH PREJUDICE CREATED A FINAL JUDGMENT UNDER 28 U.S.C. 1291 PERMITTING THE NINTH CIRCUIT TO REVIEW THE ORDER STRIKING CLASS ALLEGATIONS ..... 22

A. This Court Has Long Recognized That All Final Judgments Are Final Decisions For Purposes Of 28 U.S.C. 1291 ..... 23

B. Microsoft's Effort To Create An Atextual *Exception* To Section 1291 Is Meritless ..... 26

1. Microsoft demonstrably misreads *Livesay* ..... 27

2. Microsoft also misapprehends Rule 23(f) ..... 31

II. MICROSOFT'S POSITION REGARDING 28 U.S.C. 1291 IS PREDICATED ENTIRELY ON POLICY ARGUMENTS THAT ARE MISGUIDED AND MISDIRECTED ..... 34

A. The Legal System Has Clear, Built-in Protections That Limit Any Abuse Of Voluntary Dismissals With Prejudice ..... 35

B. Microsoft's Position Would Frustrate The Efficient Resolution Of Disputes ..... 38

C. In Any Event, Microsoft's Attempt To "Refine When A District Court Ruling Is 'Final'" Should Be Addressed Through Rulemaking ..... 43

III. THERE WAS NO ARTICLE III OBSTACLE PREVENTING NINTH CIRCUIT REVIEW OF THE ORDER STRIKING CLASS ALLEGATIONS ..... 44

A. Respondents' Individual Claims Were Impaired By The Class Order, And Respondents Expressly Reserved Their Rights To Challenge That Impairment ..... 44

B. Even If The Voluntary Dismissal In This Case Did Moot Respondents' Individual Claims, It Did Not Moot The Lawsuit ..... 50

1. Under *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), respondents have an economic interest in class certification that satisfies Article III ..... 52

2. Respondents also have the same noneconomic interest in obtaining class certification that was endorsed by *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980) ..... 55

CONCLUSION ..... 58

## TABLE OF AUTHORITIES


Cases — Page(s)

*Abney* v. *United States*,
431 U.S. 651 (1977) ..... *passim*

*Amchem Prods., Inc.* v. *Windsor*,
521 U.S. 591 (1997) ..... 47

*Canter, Adm'x* v. *Am. Ins. Co.*,
28 U.S. (3 Pet.) 307 (1830) ..... 4

*Carnegie* v. *Household Int'l, Inc.*,
376 F.3d 656 (7th Cir. 2004) ..... 47

*Catlin* v. *United States*,
324 U.S. 229 (1945) ..... 4, 26

*Cent. Transp. Co.* v. *Pullman's Palace Car Co.*,
139 U.S. 24 (1891) ..... 53, 54

*Chira* v. *Lockheed Aircraft Corp.*,
634 F.2d 664 (2d Cir. 1980) ..... 54

*Cohen* v. *Beneficial Industrial Loan Corp.*,
337 U.S. 541 (1949) ..... 5

*Coopers & Lybrand* v. *Livesay*,
437 U.S. 463 (1978) ..... *passim*

*Costello* v. *BeavEx, Inc.*,
810 F.3d 1045 (7th Cir. 2016) ..... 42

*Deposit Guar. Nat'l Bank* v. *Roper*,
445 U.S. 326 (1980) ..... *passim*

*Dig. Equip. Corp.* v. *Desktop Direct, Inc.*,
511 U.S. 863 (1994) ..... 5, 37

*Downey* v. *State Farm Fire & Cas. Co.*,
266 F.3d 675 (7th Cir. 2001) ..... 33, 51

*Espenscheid* v. *DirectSat USA, LLC*,
688 F.3d 872 (7th Cir. 2012) ..... 60, 61

*Evans* v. *Phillips*,
17 U.S. (4 Wheat.) 73 (1817) ..... 53

*Flores* v. *Cabot Corp.*,
604 F.2d 385 (5th Cir. 1979) ..... 43

*Forgay* v. *Conrad*,
47 U.S. (6 How.) 201 (1848) ..... 5

*Gabelli* v. *SEC*,
133 S. Ct. 1216 (2013) ..... 57

*Gable* v. *Land Rover N.A., Inc.*, No. CV07-0376,
2008 WL 4441960 (C.D. Cal. 2008) ..... 15, 16, 18

*Gary Plastic Packing Corp.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
903 F.2d 176 (1990) ..... 38

*Gillespie* v. *U.S. Steel Corp.*,
379 U.S. 148 (1964) ..... 5

*Haldeman* v. *United States*,
91 U.S. 584 (1875) ..... 54

*In re D.C. Water & Sewer Auth.*,
561 F.3d 494 (D.C. Cir. 2009) ..... 37

*In re Mego Fin. Corp. Sec. Litig.*,
213 F.3d 454 (9th Cir. 2000) ..... 61

*In re Microsoft Xbox Scratched Disc Litig.*, No.
C07-1121, 2009 WL 10219350 (W.D. Wash. Oct.
5, 2009) ..... 15, 16, 17

*In re Skinner & Eddy Corp.*,
265 U.S. 86 (1924) ..... 53

*In re Tiffany*,
252 U.S. 32 (1920) ..... 4

*Kelly* v. *Great Atl. & Pac. Tea Co.*,
86 F.2d 296 (4th Cir. 1936) ..... 54, 55

*Kotteakos* v. *United States*,
328 U.S. 750 (1946) ..... 42

*Matusick* v. *Erie Cty. Water Auth.*,
757 F.3d 31 (2d Cir. 2014) ..... 42

*Mohawk Indus., Inc.* v. *Carpenter*,
558 U.S. 100 (2009) ..... 10, 37, 50

*Morrison Knudsen Corp.* v. *Fireman's Fund Ins. Co.*,
175 F.3d 1221 (10th Cir. 1999) ..... 43

*New Hampshire* v. *Maine*,
532 U.S. 742 (2001) ..... 34

*OFS Fitel, LLC* v. *Epstein, Becker, and Green, P.C.*,
549 F.3d 1344 (11th Cir. 2008) ..... 55

*Pac. R.R.* v. *Ketchum*,
101 U.S. 289 (1879) ..... 27, 33

*Pelletz* v. *Weyerhaeuser Co.*,
592 F. Supp. 2d 1322 (W.D. Wash. 2009) ..... 61

*Richards* v. *Delta Air Lines, Inc.*,
453 F.3d 525 (D.C. Cir. 2006) ..... 62

*Rudolph* v. *Sensener*,
39 App. D.C. 385 (1912) ..... 54

*SEC* v. *Gabelli*,
653 F.3d 49 (2d. Cir. 2011) ..... 57

*Shinseki* v. *Sanders*,
556 U.S. 396 (2009) ..... 42

*So. Pac. Trans. Co.* v. *ICC*,
69 F.3d 583 (D.C. Cir. 1995) ..... 35

*Stack* v. *Boyle*,
342 U.S. 1 (1951) ..... 2, 50

*Swint* v. *Chambers Cty. Comm'n*,
514 U.S. 35 (1995) ..... 8, 10, 37, 49

*Tollett* v. *Henderson*,
411 U.S. 258 (1973) ..... 33

*U.S. Parole Comm'n* v. *Geraghty*,
445 U.S. 388 (1980) ..... 3, 63, 64

*United States* v. *Babbitt*,
104 U.S. 767 (1881) ..... 51

*United States* v. *Evans*,
9 U.S. (5 Cranch) 280 (1809) ..... 53

*United States* v. *Procter & Gamble*,
356 U.S. 677 (1958) ..... *passim*

*Webb* v. *ABF Freight Sys., Inc.*,
155 F.3d 1230 (10th Cir. 1998) ..... 35

*Wolin* v. *Jaguar Land Rover N.A., LLC*,
617 F.3d 1168 (9th Cir. 2010) ..... 16, 17, 18

**Statutes** Page(s)

9 U.S.C. 16(a)(1)(C) ..... 4

15 U.S.C. 29 ..... 26

28 U.S.C. 1291 ..... *passim*

28 U.S.C. 1292(a)(1) ..... 4

28 U.S.C. 1292(a)(2) ..... 4

28 U.S.C. 1292(a)(3) ..... 4

28 U.S.C. 1292(e) ..... 6

28 U.S.C. 2072(c) ..... 6, 44, 45

28 U.S.C. 2111 ..... 38

62 Stat. 989 ..... 26

Judiciary Act of 1789 § 21 ..... 3

Judiciary Act of 1789 § 22 ..... 3

Judiciary Act of 1789 § 25 ..... 3

**Other Authorities** **Page(s)**

2015 Federal Court Management Statistics Report, http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-december-2015 ..... 37

7B Charles A. Wright et al., Federal Practice & Procedure § 1802 (3d ed. 2005) ..... 9

Appellate Advisory Committee Agenda Books ..... 8, 9

Appellate Advisory Committee Meeting Minutes ..... 7, 8

Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539 (1932) ..... 3

Civil Advisory Committee Meeting Minutes ..... 7

Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error*, 25 Loy. L.A. L. Rev. 893 (1992) ..... 39

Note, *Interlocutory Appeal From Orders Striking Class Action Allegations*, 70 Colum. L. Rev. 1292 (1970) ..... 39

Notes of Civil/Appellate Subcommittee Conference Calls ..... 7

Report of the Federal Courts Study Committee (Apr. 2, 1990) ..... 5

Richard A. Posner, *Introduction—Federal Courts Symposium*, 1990 BYU L. Rev. 1 (1990) ..... 5

Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. Pitt. L. Rev. 717 (1993) ..... 6

Thomas E. Willging et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (Federal Judicial Center 1996) ..... 35

**Rules** Page(s)

Fed. R. Civ. P. 23(f) ..... *passim*

Fed. R. Crim. P. 11(a)(2) ..... 29

## INTRODUCTION

According to Microsoft, the court of appeals lacked jurisdiction to hear an appeal from a final judgment dismissing respondents' claims with prejudice. Microsoft is wrong. Jurisdictional rules, including appellate ones, should be simple and clear. Here, Microsoft challenges the simplest and oldest appellate rule of all: an appeal lies when a case is over. To win that challenge, Microsoft must overcome an extremely heavy burden, which it cannot do.

The relevant facts are straightforward. Respondents brought a putative class action over a design defect in a Microsoft video-game console. The district court erroneously struck respondents' class allegations, and the Ninth Circuit declined to hear a Fed. R. Civ. P. 23(f) appeal. Because the value of respondents' claims was small, litigating those claims individually was economically irrational. Respondents therefore asked the district court to dismiss their lawsuit with prejudice so they could appeal the class order. The district court entered judgment accordingly, and the case was over. On appeal, the Ninth Circuit reversed the order striking the class allegations and remanded the case to be litigated.

Microsoft's principal submission is that the Ninth Circuit lacked jurisdiction because a final judgment obtained through voluntary dismissal is not an appealable "final decision" under 28 U.S.C. 1291. That is false. As this Court has acknowledged for decades, "a final judgment always is a final decision" for purposes of Section 1291. *Abney* v. *United States*, 431 U.S. 651, 658 (1977) (*Abney*) (quoting *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., separate opinion)). And neither

*Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) (*Livesay*) nor Fed. R. Civ. P. 23(f)—both of which address *prejudgment* orders—suggests otherwise.

Microsoft urges this Court to craft an atextual exception to Section 1291. According to Microsoft, treating a final judgment obtained through voluntary dismissal as a "final decision" will undermine Section 1291's goals. Not so. In light of the serious costs and risks of this "tactic," few plaintiffs will stake their entire case on anything short of critical issues, and adverse class-certification rulings fit comfortably within that category. Unlike Microsoft's approach, this process will produce an efficient and fair use of judicial and litigant resources. If an adverse ruling is affirmed, the litigation is done forever. If reversed, the parties can litigate with the appropriate level of attention and resources. Unlike Microsoft's rule, it does not force plaintiffs into a Hobson's choice of litigating a tiny claim to verdict at great cost or giving up the right to appeal.

Microsoft's secondary argument is that the Ninth Circuit lacked jurisdiction because the voluntary dismissal rendered this case moot. Microsoft is incorrect.

First, Microsoft's true objection is grounded in waiver principles, not jurisdictional ones. It is plain that this adverse judgment gives rise to a cognizable Article III controversy; the only question is whether respondents waived their claims, and they plainly did not. Indeed, respondents did the *opposite* of waiver by expressly reserving their rights to pursue the entirety of their claims on appeal.

Second, Microsoft cites a line of cases from the 1800s for the proposition that no appeal lies from a judgment of

voluntary nonsuit. But Microsoft's position has a fatal problem: in the 1800s, such nonsuits were entered *without* prejudice—meaning the same lawsuit could always be raised in the same court without any harm to the plaintiff's protected interests. That factor drove those decisions, and Microsoft cannot apply that narrow principle in this very different context.

Finally, even were Microsoft right that respondents' individual claims are extinguished, respondents could still invoke appellate jurisdiction. This Court's decisions in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980) (*Roper*) and *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980) (*Geraghty*) make clear that Article III presents no barrier to appealing the adverse-certification ruling itself.

Affirmance is warranted.

## STATEMENT OF THE CASE

### A. Statutory Background

1. The final judgment rule is currently embodied in 28 U.S.C. 1291. Borrowed from English common law, it has been part of our system since the federal courts were created by Congress. See Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539 (1932). The rule originally provided that an appeal could be taken only from a "final judgment or decree." Judiciary Act of 1789 § 25; see also *id.* §§ 21, 22. Later, that language was changed slightly (the rule now reads "final decisions"), but its meaning remains the same. See *In re Tiffany*, 252 U.S. 32, 36 (1920). A decision is "final" if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945) (citation omitted).

The final judgment rule has been justified as a means to prevent disruptive appeals. See, *e.g.*, *Canter, Adm'x* v. *Am. Ins. Co.*, 28 U.S. (3 Pet.) 307, 318 (1830) (rule prevents "great delays[] and oppressive expenses"). But it may cause injustice if strictly applied in certain pre-judgment circumstances. That reality has led to the creation of statutory exceptions.[1] And it has heavily influenced this Court's interpretation of 28 U.S.C. 1291.[2]

The most significant judicial gloss on the phrase "final decisions" (as applied to pre-judgment orders) is the collateral order doctrine established by this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The doctrine allows "a narrow class of decisions that do not terminate the litigation" to "nonetheless be treated as 'final'" for purposes of 28 U.S.C. 1291, if they satisfy a three-part test. *Dig. Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994).[3] The proper application of the collateral order doctrine has confounded lower courts necessitating this Court's repeated intervention over the past half century.

---

[1] See, *e.g.*, 28 U.S.C. 1292(a)(1) (injunctive relief); 28 U.S.C. 1292(a)(2) (appointing a receiver); 28 U.S.C. 1292(a)(3) (rights and liabilities of parties to admiralty cases); 9 U.S.C. 16(a)(1)(C) (application to compel arbitration).

[2] See, *e.g.*, *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848); *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148 (1964).

[3] A pre-judgment order satisfies that test if it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable * * * [after] final judgment." *Livesay*, 437 U.S. at 468 (1978).

2. In 1990, the Federal Courts Study Committee[4] expressed concerns that the collateral order doctrine had resulted in the frequent and undesirable exercise of *ad hoc* judicial policymaking. Report of the Federal Courts Study Committee 95 (Apr. 2, 1990).[5]

As such, the Committee "propose[d] that Congress consider permitting the rulemaking process to refine and supplement definitions of appellate jurisdiction under the Rules Enabling Act, 28 U.S.C. § 2072." *Ibid.* According to the Committee's report:

> The rulemaking authority under this proposal would include authority both to change * * * decisional results under the finality rule of 28 U.S.C. § 1291 and to add to—but not subtract from—the list of categories of interlocutory appeal permitted by Congress in 28 U.S.C. § 1292.

*Id.* at 96.

Congress agreed.[6] In 1990, it passed 28 U.S.C. 2072(c) (authorizing the rulemaking process to "define

---

[4] The Study Committee was comprised of prominent jurists such as Judge Richard Posner and tasked with studying the problems of the federal courts. See Richard A. Posner, *Introduction—Federal Courts Symposium*, 1990 BYU L. Rev. 1 (1990).

[5] Specifically, the Committee noted that "[d]ecisional doctrines—such as 'practical finality' and especially the 'collateral order' rule—blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review." *Ibid.*

[6] See generally Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. Pitt. L. Rev. 717 (1993). As Professor Martineau explains:

when a ruling of a district court is final for the purposes of appeal under section 1291 of this title."). And in 1992, it passed 28 U.S.C. 1292(e) (authorizing the rulemaking process to "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [in 28 U.S.C. 1292].").[7]

3. To date, rulemakers have considered using—but have not yet employed—the authority conferred by 28 U.S.C. 2072(c) to propose rules changing the definition of finality in 28 U.S.C. 1291.[8] The most notable example involves the subject of "manufactured finality" in multi-claim litigation.

---

> In 1990 and 1992 Congress enacted two acts, each implementing some of the recommendations the Federal Courts Study Committee ("FCS Committee") made in its report dated April 2, 1990 [which] allow changes in the final judgment rule as contained in sections 1291 and 1292 of title 28 of the U.S. Code.

*Id.* at 718.

[7] This Court has expressed a preference for using the rulemaking process to define or refine when a district court ruling is "final" under 28 U.S.C. 1291 and to determine that a type of interlocutory order should be appealable under 28 U.S.C. 1292. See, *e.g.*, *Swint* v. *Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995) (*Swint*) ("Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect.").

[8] On the other hand, rulemakers have (albeit only once) used the authority conferred by 28 U.S.C. 1292(e) to enact a rule that would authorize the appeal of an interlocutory decision not otherwise available under Section 1292. That rule is Fed. R. Civ. P. 23(f) which authorizes an appellate court to "permit an appeal from an order granting or denying class-action certification."

In the multi-claim context, "[t]he 'manufactured finality' doctrine * * * concerns situations in which the district court dismisses with prejudice fewer than all the plaintiff's claims and the plaintiff then voluntarily dismisses the remaining claims in order to obtain an appealable judgment." Minutes of November 2008 Appellate Advisory Committee Meeting at 18.[9] Noting that "[t]he circuits take varying approaches to this doctrine," *id.* at 19, three different rules subcommittees proceeded to study and discuss the manufactured finality doctrine with frequency for several years.[10]

---

[9] Available at http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-appellate-procedure-november-2008.

[10] This topic was discussed at seven different meetings of the Appellate Advisory Committee, see Meeting Minutes for November 2008 at 18-20, April 2009 at 17-18, October 2010 at 10-12, April 2011 at 12-14, September 2012 at 12-13, April 2013 at 16-17, and April 2015 at 32-33, available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes, four different meetings of the Civil Advisory Committee, see Meeting Minutes for November 2010 at 53-55, April 2011 at 39-40, November 2011 at 32-33, and April 2015 at 21-25, available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes, and four different conference calls of the Civil/Appellate Subcommittee, see Agenda Books for November 2010 at 597-601 and April 2015 at 431-445, available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books. The issue also prompted six detailed memoranda prepared by the Reporter of the Appellate Advisory Committee. See Agenda Books for November 2008 at 197-221, April 2009 at 280-294, September 2012 at 251-257, April 2013 at 359-368, April 2015 at 945, and October 2015 at 87, available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books.

So far, the rulemakers have made the considered decision not to propose any rules addressing multi-claim manufactured finality. See, *e.g.*, Minutes of April 2015 Appellate Advisory Committee Meeting at 32-33.[11] Nonetheless,

> [t]he chair [of the Appellate Advisory Committee] noted, however, that if the division in authority warrants a uniform national rule, the rulemakers have an important role to play in making policy decisions about finality—as the Supreme Court made clear in *Mohawk* * * * and *Swint* * * * .

*Id.* at 33.

Unlike the question of "manufactured finality" in a multi-claim context, the question of "manufactured finality" in the class certification setting has not yet been presented by any stakeholder for thorough study by the rulemakers. But the issue is beginning to organically attract attention; in 2013, an Appellate Advisory Committee memorandum motivated by the "Supreme Court's observation in *Mohawk* * * * and *Swint*" about the importance of the rulemaking process in construing 28 U.S.C. 1291 took note of circumstances like this one, and went on to describe "[o]rders denying class status if the putative class member is willing to waive his or her individual claims" as "effectively creating a final

---

[11] Available at http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-appellate-procedure-april-2015.

judgment." See October 2013 Appellate Advisory Committee Agenda Book Supplement at 7-21.[12]

That is hardly surprising. As a leading treatise, for which a longstanding member of the Committee on Rules of Practice and Procedure[13] is an author, notes:

> The sixth method of obtaining review following a court order eliminating the class-action allegations is tactically risky. If the district court strikes the class-action designation with leave to amend so that the action may proceed on an individual basis, the party seeking class treatment may refuse to do so and allow the court to enter a final judgment dismissing the complaint with prejudice. An appeal then can be taken since the adjudication is final and falls within Section 1291. However, this procedure is a dangerous one. If the district court's order is sustained on appeal, plaintiff may be deemed to have forfeited the right to present the merits of the claims by insisting on a review of the class-action question.

7B Charles A. Wright et al., Federal Practice & Procedure § 1802 (footnotes omitted).

**B. Facts and Procedural History**

1. Microsoft introduced the Xbox 360 in 2005. J.A. 11. Over the next decade, it sold more than 25

---

[12] Available at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-appellate-procedure-october-2013.

[13] This committee (also known as the standing committee) reviews the recommendations of the five advisory committees and makes recommendations to the Judicial Conference. 28 U.S.C. 2073(b).

million Xbox 360 consoles in the United States alone and more than 50 million worldwide. J.A. 35. The retail price of the console ranged from $149 to $479.99 depending on the configuration. *Ibid.*

The Xbox 360 uses an optical disc drive to play game discs. *Ibid.* Game discs are licensed by Microsoft and priced between $30 and $60 each. *Ibid.* The Xbox 360's disc drive can also play a range of other optical media, including DVDs and audio CDs. *Ibid.*

Microsoft undertook a massive marketing campaign to promote the Xbox 360. Sales literature showed the console sitting on the floor or on an ordinary shelf. J.A. 35-36. Television commercials depicted users engaging in spirited movements as they enthusiastically played games simulating, among other activities, athletic competition (*e.g.*, "2010 FIFA World Cup South Africa"), infantry warfare (*e.g.*, "Call of Duty"), or live rock music performance (*e.g.*, "Guitar Hero"). J.A. 36. And when Microsoft later launched the "Kinect," a device that allows users to control games through their own movements, it encouraged users to "[s]imply jump in." *Ibid.*

The Xbox 360 appealed to gamers in large part due to the speed at which its disc drive spins game discs. J.A. 11. Faster spinning produces smoother graphics and enhances the overall gaming experience, and the Xbox 360's drive could spin discs at roughly twice the speed of its chief competitors. *Ibid.* For instance, the Nintendo Wii and Sony PlayStation III spin discs at 3000 to 4000 rotations per minute, compared to 7500 rotations per minute for the Xbox 360. *Ibid.*

The Xbox 360's greater spin speed came at a cost, however. The high-speed rotation—combined with even small, unintentional movements well within normal use—can sometimes generate gyroscopic pressure that causes a disc to decouple from the spindle that rotates it and crash against the drive's interior parts. J.A. 36.[14] This collision creates distinctive circular grooves that can render the disc permanently unusable by preventing the drive from reading the disc's data. *Ibid.*

Microsoft was well aware of a risk of decoupling. Indeed, before it even launched the Xbox 360, its engineers had discovered the problem (although they hypothesized that the decoupling occurred only when users tilted the console during game play). J.A. 12, 85.

Several fixes were possible. For example, Microsoft could have increased the magnetic force of the disc holder, slowed the rotation speed of the disc drive, or placed small soft patches inside the machine where the discs were likely to contact the machine parts. J.A. 13. Instead, Microsoft simply placed a sticker across the disc-tray mechanism that read, "Do not move console with disc in tray." J.A. 12. The Xbox 360 manual also urges users to "remove discs before moving the console or tilting it between the horizontal and vertical positions." J.A. 12, 85.

Unsurprisingly in light of the nature of the defect, shortly after launching the Xbox 360, Microsoft began to

---

[14] Respondents believe that the fundamental problem was the machine's obsolete tray-loading design. Chief competitors Nintendo Wii and Sony PlayStation III both use a slot-loading drive instead, and their disc holders apply greater force to game discs. J.A. 13

receive complaints that the console scratched game discs during normal use. J.A. 12. According to many owners, the console scratched discs when subject even to the smallest of movements, including vibrations and other indirect forces that occur in an ordinary household environment. J.A. 37. As of April 30, 2008, Microsoft's customer-service department had received approximately 55,000 complaints about scratched discs. J.A. 11. And that number likely understates the true scope of the problem. Some customers who experience scratching may complain to their retailer instead of the manufacturer, and others may decline to complain to anyone, deterred by the warning sticker, Microsoft's refusal to admit any fault, and the time and effort required.

Such widespread scratching problems have not occurred with other consumer products that use optical disc drives, including portable CD and DVD players, notebook computers, and camcorders—despite these devices being subject to regular tilting and movement while operating. J.A. 36-37. That is because, unlike Microsoft, those industry engineers implemented simple, inexpensive, and obvious measures to protect discs while spinning. J.A. 37.

In the face of these complaints, Microsoft has publicly denied any defect with the console design. J.A. 38. It instead blames its customers for misusing the Xbox 360 by deliberately moving the console during play. J.A. 12, 38. Nevertheless, in 2007 Microsoft began a "disc replacement program." Although the cost of pressing and shipping a replacement disc is substantially less than a dollar, the program charged a $20 fee to replace damaged discs. J.A. 38-40.

Microsoft has steadfastly refused to recall the Xbox 360 or compensate users whose game discs were damaged by the faulty disc-drive design. J.A. 38.

2. Respondents are not the first individuals to bring a putative class action against Microsoft based on the Xbox 360's disc-drive defect. In 2007, several suits with similar allegations were consolidated in the Western District of Washington. See Pet. App. 6a; *In re Microsoft Xbox Scratched Disc Litig.*, No. C07-1121, 2009 WL 10219350 (W.D. Wash. Oct. 5, 2009) (J.A. 10-24). The district court there denied class certification, deciding that the class claims foundered on Rule 23(b)(3)'s predominance requirement.

That conclusion rested heavily on the analysis of a California district-court decision rejecting class treatment in a case alleging defects in the Land Rover vehicle's tire-alignment mechanism. J.A. 21-24 (citing *Gable* v. *Land Rover N.A., Inc.*, No. CV07-0376, 2008 WL 4441960 (C.D. Cal. 2008) (*Gable*)). In *Gable* the plaintiffs claimed that a manufacturing defect in all Land Rovers caused the tires in some Land Rovers to wear out unevenly, prematurely requiring those car owners to purchase new tires. J.A. 21. The district court ruled that individual questions regarding damages predominated because some owners would never suffer the effects of the alleged defect. *Ibid.* Individual issues of causation likewise predominated because any given tire might wear out for a host of reasons aside from the alleged alignment defect. J.A. 21-22.

The Scratched Disc Litigation court found *Gable*'s reasoning persuasive. Comparing the Xbox 360 console to the Land Rover vehicle, and comparing the game

discs to the tires, the court concluded that the Xbox defect had not manifested itself in all consoles, and that some scratches that had occurred may have been caused by a user's misuse rather than the defect. J.A. 22-23. Individual issues of damages and causation thus predominated over common ones, and class treatment was inappropriate. J.A. 24. The Scratched Disc Litigation plaintiffs later settled their individual claims and the consolidated cases were dismissed.

Shortly thereafter, however, the Ninth Circuit rejected the California district court's certification analysis in the Land Rover case. See *Wolin* v. *Jaguar Land Rover N.A., LLC*, 617 F.3d 1168 (9th Cir. 2010) (*Wolin*). The court of appeals held that "proof of the manifestation of a defect is not a prerequisite to class certification." *Id.* at 1173. Although factors apart from the alleged alignment defect might "affect premature tire wear, they d[id] not affect whether" the alignment defect existed or whether the defect violated consumer-protection laws. *Ibid.* Therefore, because the alleged defect would exist in every class member's vehicle, class treatment was proper.

3. Prompted by the intervening decision in *Wolin*, Respondents filed the present action. On behalf of themselves and other Xbox 360 owners, they allege that every Xbox 360 disc drive is defectively designed in a way that can permanently damage game discs even during normal, everyday usage. J.A. 27, 35-40. That defect breached Microsoft's warranties and violated various state and federal consumer-protection laws.

Before answering the complaint—and before Respondents could conduct any discovery—Microsoft

moved to strike the class allegations, and the district court granted the motion. J.A. 88-99. The court determined that principles of comity required it to defer to the denial of class certification in the Scratched Disc Litigation, and further concluded that *Wolin* did not undermine that analysis. J.A. 93-99. Respondents sought permission to appeal under Rule 23(f), J.A. 100-120, which the Ninth Circuit denied, J.A. 121.

Unable to proceed with their class claims, Respondents made a risky choice. To secure a final decision that would lead to appellate review of the certification order, they moved to dismiss their action with prejudice, noting their intent to appeal the order striking the class allegations. J.A. 122-124. The motion was granted "[b]ased on" a seven-paragraph stipulation between the parties. Pet. App. 39a. The stipulation provided that it was "not filed pursuant to a settlement agreement" and that dismissal would be with prejudice. Pet. App. 36a.

The stipulation also reiterated Respondents' intent "'to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations.'" Pet. App. 39a (quoting J.A. 122-123). Nothing in the stipulation waived Respondents' rights to pursue their individual claims or to pursue relief solely on behalf of the class, should the certification decision be reversed. To that end, the parties expressly "reserv[ed]" all "their arguments as to the propriety of any appeal." Pet. App. 36a-37a.

4. On appeal, the Ninth Circuit concluded that it had jurisdiction and that the district court abused its discretion in striking the class allegations. Pet. App. 19a. As to appellate jurisdiction, Microsoft argued "that a

voluntary dismissal with prejudice does not sufficiently affect the merits of the substantive claims to constitute an appealable final judgment." Pet. App. 11a.

The court of appeals disagreed. Because Respondents and Microsoft had entered into a stipulation that explicitly disclaimed any settlement, the Ninth Circuit held that the voluntary dismissal with prejudice was "'a sufficiently adverse—and thus appealable—final decision'" under 28 U.S.C. 1291. Pet. App. 12a.

Turning to the merits of the certification inquiry, the Ninth Circuit concluded that *Wolin* "expressly and specifically rejected" the foundation of *Gable*—and thus the foundation of the order under review here—namely, "that individual manifestations of the defect precluded resolution of the claims on a class-wide basis." Pet. App. 14a. The court of appeals emphasized that Respondents' "position is that the design defect itself breaches the express warranty." Pet. App. 16a. "[I]ndividual factors may affect the timing and extent of the disc scratching," but they do not pertain to whether the Xbox 360 console is itself defective or whether that defect breached any warranty. Pet. App. 15a-16a. The district court's order thus was an abuse of discretion. Pet. App. 19a. The Ninth Circuit did not decide, however, whether Respondents' class allegations ultimately are appropriate for class treatment, instead remanding for further proceedings. *Ibid.*

5. This Court granted certiorari to address the court of appeals' jurisdiction. 136 S. Ct. 890 (2016).

## SUMMARY OF ARGUMENT

I. Microsoft insists that the case-closing judgment in this case is not a "final decision" under 28 U.S.C. 1291. Microsoft is wrong. The settled rule for decades is that "a final judgment *always* is a final decision." *Abney* v. *United States*, 431 U.S. 651, 658 (1977) (emphasis added). It makes no difference *why* the judgment was entered; a dismissal with prejudice resolves all pending matters in district court, leaving nothing else to do. The court simply enters judgment "*and close[s] th[e] case.*" Pet. App. 39a (emphasis added).

Microsoft cannot square its position with Section 1291's plain meaning, so it seeks an *exception* to its unambiguous scope. It offers three arguments, but all three fail.

A. Microsoft asserts that "finality" has long received "a practical rather than a technical construction." Pet. Br. 19 (internal quotation marks omitted). True enough in some settings, but not here. A *technical* final judgment is also a *practical* final judgment. The Court has relaxed finality in the collateral order context, where pre-judgment orders in *open* cases may still satisfy Section 1291. But cases construing the outer boundary of "finality" have never justified cutting off final decisions at its core. There is no doubt (under *any* construction) that an actual final judgment qualifies (unremarkably) as a "final decision." *Abney*, 431 U.S. at 658.

B. Microsoft argues that respondents' voluntary dismissal with prejudice "flouts" or "contravenes" this Court's decision in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). But *Livesay*'s holding starts and stops with *interlocutory* appeals. It addressed whether

indisputably nonfinal orders might nonetheless fall within Section's 1291's reach. It rejected the death-knell doctrine because it was unworkable and unprincipled, due to defects inherent in *its interlocutory setting*. The Court nowhere hinted that a truly final judgment (volunteered or otherwise) would fail to give rise to an ordinary appeal under Section 1291.

C. Microsoft contends that respondents also seek an improper end-run around Fed. R. Civ. P. 23(f). According to Microsoft, if respondents wish to seek review of the district court's certification ruling, they can only seek an interlocutory appeal under Rule 23(f) or review on final judgment *after* litigating their individual claims (for a few hundred dollars) through a full trial. This misses the point entirely. Rule 23(f) exists to allow *interlocutory* appeals; respondents did not obtain an interlocutory appeal—they were stuck seeking review after *final judgment*. That is not an "end run." Respondents had to stake their entire case on the outcome of an appeal, rather than retaining the right to litigate individually after pursuing interlocutory relief. Rule 23(f) is designed in part to *avoid* putting parties to that difficult decision. The fact that respondents had to resort to an inferior alternative hardly means they are undermining the spirit (much less the text) of Rule 23(f).

II. Microsoft ultimately views this case as a question of policy, but its policy arguments are misguided.

A. Microsoft insists that permitting appeals from voluntary dismissals will upend the system and produce a steady flow of time-consuming, wasteful, inefficient appeals. But Microsoft simply neglects to appreciate the clear protections built into the system that limit any

abuse. A dismissal with prejudice forces a party to hinge *everything* on the outcome of the appeal. Few parties with legitimate claims will risk their entire case on an issue unless it is truly devastating to their lawsuit. Rational self-interest alone will reduce substantially the subset of plaintiffs interested in voluntary dismissals.

This strategy also comes with considerable costs as a deterrent. Plaintiffs will be forced to accept a significant burden in expense and delay in pausing litigation to take up an issue on appeal. Unlike interlocutory appeals, there is no prospect of litigating on two tracks; a final judgment ends all litigation in the district court, forcing the plaintiff to wait for the duration of the appeal before having his day in court. In light of the average run time for appeals, this cost is real.

Microsoft also overlooks the impact of harmless-error doctrine. It is well settled that appellate courts will not grant relief unless an error affects a party's "substantial rights." 28 U.S.C. 2111. While Microsoft focuses intently on trivial issues ("discovery orders," "evidentiary rulings," Pet. Br. 21), it is barely plausible that the vast majority of such minor issues would qualify for appellate relief. Rational lawyers do not voluntary dismiss to take frivolous appeals—they do so to challenge mission-critical rulings that make the game worth the candle. Those are precisely the kinds of issues that warrant appellate attention.

B. Microsoft's theory would also harm good-faith litigants and frustrate systemic objectives. Microsoft insists that parties must choose between Rule 23(f) interlocutory appeals or full-blown litigation over tiny claims. It is cold comfort to instruct a litigant with a $30

claim that he can always appeal a class-determination after litigating a complex lawsuit for years. Microsoft does not truly believe that many parties will endure those costs—all to see if they can overcome two major hurdles: (i) prevailing at trial; and (ii) prevailing again in reversing the class-certification ruling on appeal. And this underscores the obvious reality of Microsoft's position: parties with legitimate claims who (as a class) have suffered significant aggregate harm will simply throw in the towel and walk away. No one thinks Section 1291 was designed to immunize legal violations from review.

While few litigants will undertake extensive litigation over minor claims, even that alternative is costly to the system. Parties on both sides will ultimately devote excessive resources to litigating cases on the *chance* that a case may end up as a certified class. Certain individual trials will have to be relitigated as a class trial, twice burdening the system with the same claims.

The alternative is far superior: an appeal from a voluntary dismissal will give adequate notice to all sides of the true scope of the controversy. If the prior order is upheld on appeal, the case is forever dismissed—and the system will avoid the needless waste of an exhaustive trial over individual claims. And if the order is reversed, both sides will be able to calibrate their efforts to the true amount at stake. In the end, there are few scenarios where Microsoft's theory would actually spare any expense, rather than impose distinct and unfair societal costs.

C. In any event, if Microsoft believes that the jurisdictional rules should be amended, its appropriate

audience is Congress or the Rules Advisory Committee. It is wrong to carveout an extra-statutory exception from the plain sweep of Section 1291.

III. There is Article III jurisdiction for the courts to review respondents' claims, and Microsoft's contrary position is baseless.

A. Microsoft first insists that the case is moot, but Microsoft is wrong. This is ultimately a *waiver* issue, not a *jurisdictional* one, and it is obvious that nothing was waived here; indeed, respondents explicitly reserved their rights to challenge the class order and advance their individual claims on any remand.

In asserting that a voluntary dismissal moots any future appeal, Microsoft misreads this Court's decisions. Without realizing it, Microsoft has relied extensively on a series of cases that involved voluntary non-suits *without prejudice*. A dismissal without prejudice implicates different Article III interests than a final judgment forever barring a litigant's claims. Had Microsoft applied the *correct* line of decisions, it would have recognized that the adverse class-certification ruling preserved the full panoply of Article III interests necessary to raise all issues on appeal.

B. Even if respondents' individual claims were somehow mooted, there is still Article III jurisdiction to adjudicate the class-certification issues on appeal. Under this Court's cases, respondents have two protected interests in reversing the prior ruling: a personal economic stake and a noneconomic procedural interest. These class-based rights are related but distinct from respondents' individual claims, and they survive even if respondents' individual claims somehow do not.

## ARGUMENT

### I. RESPONDENTS' VOLUNTARY DISMISSAL WITH PREJUDICE CREATED A FINAL JUDGMENT UNDER 28 U.S.C. 1291 PERMITTING THE NINTH CIRCUIT TO REVIEW THE ORDER STRIKING CLASS ALLEGATIONS

Throughout this litigation, Microsoft has chiefly resisted appellate review by saying that a final judgment was not "final" under 28 U.S.C. 1291. See, *e.g.*, Pet. Br. 16-33. That position is baseless. The plain statutory text forecloses Microsoft's argument, and Microsoft's attempt to seek an *exception* to Section 1291's command falls short. Microsoft ultimately relies on authorities restricted to *interlocutory* orders, not final judgments. That is a distinction *with* a difference: parties may not have an absolute right to take interlocutory appeals from class-certification rulings, but that says nothing about their right to obtain review on final judgment.

Microsoft assuredly knows the upshot of its position: looking to the real world, it is simply not true that most parties with small-value claims will absorb tremendous costs and litigate to finality. And, indeed, while refusing to admit it, that assuredly is not the result Microsoft itself actually wants. Litigation is expensive and it taxes the limited resources of the parties and the courts. No one benefits from extensive, complex trials over $30 claims. What Microsoft really wants—and the result it actually envisions—is a world in which injured parties cannot seek judicial review at all. Microsoft's position is unsupportable as a matter of law and incoherent as a matter of policy. It should be rejected.

### A. This Court Has Long Recognized That All Final Judgments Are Final Decisions For Purposes Of 28 U.S.C. 1291

1. The final judgment rule of 28 U.S.C. 1291 vests appellate courts with jurisdiction to review "all final decisions" of the district courts. 28 U.S.C. 1291. For over 70 years now, this Court has understood that language to mean what it plainly says. A "final" decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945).

The Stipulation and Order at issue here (Pet. App. 35a-39a) fall easily within this definition. This is the Order in its entirety:

> Based on the foregoing Stipulation, the Court GRANTS Plaintiffs' Motion to Dismiss with Prejudice, with all parties to bear their own costs and fees. *The Court hereby directs the Clerk to enter Judgment accordingly and close this case.*

Pet. App. 39a (emphasis added). It dismisses the matter "with Prejudice" and "close[s] the case." It leaves nothing to do but execute the judgment. The decision is final for purposes of Section 1291.

2. Microsoft, however, disagrees. It says that the case may be *technically* final but it is not *practically* final, all because respondents' claims were voluntarily dismissed and could be revived with a successful appeal. Pet. Br. 18.

Microsoft is confused. It is always the case that an otherwise "final" judgment may be unwound by a successful appeal; if the prospect of additional work on

remand eliminated finality, appellate jurisdiction would be limited to cases with no prejudicial error. The relevant question is not *how* a judgment became final, but whether it *is* final. See, *e.g.*, *Pac. R.R.* v. *Ketchum*, 101 U.S. 289, 295 (1879). And this case is unequivocally final in its present form: by voluntarily dismissing their claims with prejudice, respondents eliminated any further work at the district-court level.

In seeking to avoid this finality, Microsoft insists that the Court may contract Section 1291, just as it expanded Section 1291 for certain collateral orders. Pet. Br. 19. But this reasoning is upside down. There is no basis for contracting anything. The "substance" of respondents' appeal (*ibid.*) is not "interlocutory" in any legal or practical sense; it seeks to overturn an adverse final judgment that dismisses their claims *with prejudice*. While "there are instances in which a final decision is not a final judgment," a "final judgment always is a final decision." *Abney*, 431 U.S. at 658. This Court has never relied on "practical" considerations to find that a case-closing judgment somehow fails to satisfy Section 1291.

Indeed, in direct contravention of the position advanced by Microsoft and its amici, this Court has expressly held that a plaintiff may consent to the entry of final judgment in order to appeal a prior adverse ruling that would otherwise be interlocutory. *United States v. Procter & Gamble*, 356 U.S. 677, 680-681 (1958) (*Procter & Gamble*).

In *Procter & Gamble*, the United States—following a federal grand jury investigation of possible criminal antitrust violations where no indictment was returned—filed a civil antitrust case against the company. *Id.* at

678. The United States was using the grand jury transcript to prepare the civil case for trial, and Procter & Gamble moved for production of the transcript. *Ibid.* The district court granted the motion and "entered [interlocutory] orders directing the Government to produce the transcript in 30 days." *Id.* at 679.

"The Government, adamant in its refusal to obey, filed a motion in the District Court requesting that those orders be amended to provide that, if production were not made, the court would dismiss the complaint." *Ibid.* The District Court amended the interlocutory orders and, when the United States persisted in refusing to obey, it "entered judgment of dismissal." *Id.* at 680.

In this Court, Procter & Gamble argued "that th[e] appeal may not be maintained, because dismissal of the complaint was solicited by the Government." *Ibid.* This Court rejected every basis for Procter & Gamble's jurisdictional argument, including the possible absence of statutory finality. See *Procter & Gamble*, 356 U.S. at 680 ("The orders of dismissal were final orders, ending the case.").[15]

---

[15] As this Court noted, "the case is here by way of appeal, 32 Stat. 823, as amended, 62 Stat. 869, 989, 15 U.S.C. § 29". *Procter & Gamble*, 356 U.S. at 680. That statute (15 U.S.C. 29), which applies to certain lawsuits filed by the United States, has always employed the same definition of finality as 28 U.S.C. 1291. Today, it provides that "any appeal from a final judgment entered in any such [previously described] action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28." 15 U.S.C. 29. At the time of *Procter & Gamble*, it provided that "In any civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the

Conveniently, Microsoft only discusses *Procter & Gamble* in connection with arguments about Article III. Pet. Br. 15, 35, and 37. But, if there were any doubt, the holding of *Procter & Gamble* expressly forecloses Microsoft's "interpretation" of 28 U.S.C. 1291.

### B. Microsoft's Effort To Create An Atextual *Exception* To Section 1291 Is Meritless

The judgment in this case is unequivocally "final" in every conceivable sense of Section 1291. But Microsoft ignores Section 1291's plain text, and seeks an *exception* to its unambiguous command. Courts do not lightly ignore the plain language of jurisdictional statutes. There is not a single case from this Court suggesting that an indisputably final decision—one where the entirety of the action in district court is over—is somehow not "final" for purposes of Section 1291.

In seeking a departure from this settled law, Microsoft insists that respondents are flouting the Court's decision in *Livesay* and thwarting Rule 23(f)'s review process. Yet both sources address *interlocutory* orders, not final judgments; they are driven by concerns inherent with interlocutory rulings. Respondents have simply asked the Court to follow the plain text of a jurisdictional statute. Microsoft does not wish to enforce the plain text; it wants an *exception*. And it misreads the two main sources—*Livesay* and Rule 23(f)—that it invokes as support for its atextual carveout. Microsoft's theory is wrong and should be rejected.

---

final judgment of the district court will lie only to the Supreme Court." 62 Stat. 989.

### *1. Microsoft demonstrably misreads* Livesay

As its lead argument, Microsoft argues that respondents' "voluntary dismissal tactic" somehow "contravenes" *Livesay* and "resuscitates the death-knell doctrine." Pet. Br. 13, 16. This is demonstrably false.

a. *Livesay* had nothing to do with final judgments; it involved a pre-judgment order that was *actually interlocutory*. See 437 U.S. at 469. It asked whether Section 1291 permitted an *exception* for indisputably nonfinal orders that "likely" sounded the death-knell of an action. *Ibid.*

While the Court rejected the "death-knell" doctrine, it did so for reasons having nothing to do with the situation here. In applying the doctrine, lower courts adopted "two quite different methods of identifying an appealable class ruling." *Livesay*, 437 U.S. at 472-473. The first allowed an appeal if the case met an "arbitrarily selected jurisdictional amount"—a method that invaded the "legislative * * * function" and wrongly departed from Section 1291's statutory "test of appealability"—"finality." *Id.* at 472. The second involved a fact-intensive, "individualized judicial inquiry"—exhaustively scrutinizing "the plaintiff's resources; the size of his claim and his subjective willingness to finance prosecution of the claim; the probable cost of the litigation and the possibility of joining others who will share that cost; and the prospect of prevailing on the merits and reversing an order denying class certification." *Id.* at 471 n.15. This method "waste[d]" judicial resources and had a "serious debilitating effect on the administration of justice." *Id.* at 473.

*Livesay* accordingly rejected an *exception* to finality for reasons having nothing to do with final judgments. The "death knell" doctrine was unprincipled and unworkable; it departed from Section 1291's statutory test ("finality"), and required extensive case-by-case inquiries that were inappropriate in a jurisdictional setting. A voluntary dismissal, by contrast, produces an *actual* final judgment. It requires zero additional analysis. The case is unequivocally over in the district court with nothing left to do. It creates no need to grapple with arbitrary and unwieldy fact-intensive analyses. It applies the same bright-line rule from Section 1291 that applies to all other final judgments. In short, it implicates none of *Livesay*'s core concerns.[16]

b. Despite these obvious differences, Microsoft says that a voluntary dismissal is "functionally identical" to the interlocutory orders in *Livesay*. Pet. Br. 23. That is perplexing. This case involves a final judgment; the plaintiffs in *Livesay* "sought review of an inherently nonfinal order that tentatively resolved a question that turns on the facts of the individual case." *Livesay*, 437 U.S. at 477 n.30. The Court can identify a "final decision"

---

[16] Indeed, even the defendant in *Livesay* agreed that voluntary dismissals with prejudice gave rise to appealable final judgments:

> There is also authority for the proposition that the named class representative himself may convert an adverse interlocutory class certification order into an appealable final judgment if he voluntarily dismisses his individual action under Rule 41(a). *See United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *Thomsen v. Cayser*, 243 U.S. 66 (1917).

Coopers & Lybrand's Br. at 30 n.20, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) (No. 76-1836).

here by simply recognizing the *final judgment*. There is no need to "resuscitate" the unworkable "death-knell" doctrine or contravene *Livesay*'s holding for *interlocutory* orders.

Indeed, it is *Microsoft* who is insisting on improper case-by-case determinations into the *reason* a judgment was entered. "Distinguishing between final judgments entered with the consent of both parties and final judgments entered against one party's wishes would create an extra-statutory condition on appeal. This has little to recommend it, and the possibility has been rejected by the Supreme Court." *Downey* v. *State Farm Fire & Cas. Co.*, 266 F.3d 675, 682 (7th Cir. 2001) (*Downey*) (citing *Pac. R.R.* v. *Ketchum*, 101 U.S. 289, 295 (1879)). Section 1291 directly applies on its own terms, and *Livesay* does not support an exception to its textual command.[17]

---

[17] Microsoft notes that Fed. R. Crim. P. 11(a)(2) has an express provision for "conditional" guilty pleas, and finds it telling that "the civil rules contain no 'conditional dismissal' counterpart." Pet. Br. 20. What Microsoft does not mention is that precisely this argument was rejected by other courts, and for good reason: "for jurisdictional purposes there is no distinction between 'consent' and 'adversarial' judgments. Judgments are judgments, and any party can appeal as of right from a final decision adverse to his interests." *Downey*, 266 F.3d at 682 (tracking and rejecting Microsoft's argument). Moreover, Microsoft mischaracterizes the accompanying advisory committee note. The Committee's discussion addressed the *practical* concern that "conditional pleas conflict with the government's interest in achieving finality" (Fed. R. Crim. P. 11 Advisory Committee's Note to 1983 Amendment); while the *words* are the same, the "state interest in finality" in criminal prosecutions is entirely different from *jurisdictional finality* under Section 1291.

Nor is Microsoft correct that judicial estoppel effectively left the *Livesay* plaintiffs in exactly the same position as respondents. See Pet. Br. 22 (suggesting it is "meaningless formalism" to suggest an *actual* dismissal matters because the plaintiff was "barred" from "going forward on his individual claims just the same").

Microsoft simply plucks the "judicial estoppel" rationale out of thin air. There is no hint that *Livesay* even *considered* judicial estoppel, much less equated those interlocutory orders with actual final judgments. On the contrary, *Livesay* repeatedly noted the nonfinal nature of the order, 437 U.S. at 471, 476; and specifically acknowledged that individual cases might continue. *Id.* at 470 ("the litigation will often survive an adverse class determination")). Indeed, lower courts permitted some "death knell" appeals even where plaintiffs *would continue litigating their individual claims*. A *potential* "death knell" was not always an *actual* "death knell," which was a fundamental problem with the doctrine.

In any event, Microsoft's argument is ahead of its time. Judicial estoppel was not well established in 1978. This Court did not squarely endorse the doctrine until *New Hampshire* v. *Maine*, 532 U.S. 742 (2001), and

---

Finally, Microsoft ignores an essential difference between a guilty plea and a voluntary dismissal: a guilty plea *independently* establishes guilt; without Rule 11, a prior error could not overcome a defendant's "solemn[] admi[ssion] in open court that he is in fact guilty." *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973). A voluntary dismissal, by contrast, says nothing about a party's ability to prove a claim. That is especially true where, as here, a party reserves the right to press the claim if an adverse order is overturned.

multiple circuits emphatically rejected the doctrine before *New Hampshire*. See, *e.g.*, *Webb* v. *ABF Freight Sys., Inc.*, 155 F.3d 1230, 1242 (10th Cir. 1998) ("The Tenth Circuit has firmly established that it will not be bound by the doctrine of judicial estoppel."); *So. Pac. Trans. Co.* v. *ICC*, 69 F.3d 583, 591 n.3 (D.C. Cir. 1995) ("This court, however, has firmly disapproved of judicial estoppel in prior cases."). It accordingly is pure fiction to suggest that *Livesay* understood its holding—grounded directly in the order's *interlocutory* nature—as tantamount to refusing jurisdiction where a plaintiff *actually* dismissed his entire case.[18]

### 2. *Microsoft also misapprehends Rule 23(f)*

a. According to Microsoft, respondents' "voluntary dismissal tactic" somehow "thwarts" Fed. R. Civ. P. 23(f)'s review process. Pet. Br. 29-33. Microsoft asserts that a voluntary dismissal—which permits an appeal *on final judgment*—"sidestep[s] Rule 23(f)'s carefully crafted compromise" and works an end-run around the Rule.

This is mystifying. Rule 23(f) is designed to permit *interlocutory* appeals; respondents are not attempting

---

[18] In any event, if lower courts had been viewing the "death knell" doctrine with judicial estoppel in mind, they assuredly would not have developed the two unworkable tests rejected in *Livesay*; rather, they would have simply instructed named plaintiffs to make binding representations against pursuing their individual claims. Respondents are unaware of any federal case *ever* subjecting a "death knell" plaintiff to a judicial-estoppel analysis, and Microsoft has cited none. This makes it especially unlikely that *Livesay* had estoppel in mind without uttering a single word about it.

an end-run around the Rule's procedures *because respondents are not attempting an interlocutory appeal.* Those procedures allow plaintiffs to seek immediate review of class-certification orders without risking their right to pursue their individual claims. Respondents have taken a starkly different approach: they have staked their entire action on the incorrectness of the certification ruling.

Respondents are no more circumventing the Rule's procedures—by seeking appellate review as of right—than any other party filing an appeal after litigating a full trial. The judicial discretion afforded by the Rule is limited to the context in which it arises: appellate courts have "unfettered discretion" to decide whether to permit interlocutory review. Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 Amendment. But that discretion is not frustrated by parties who forgo Rule 23(f)'s compromise and instead accept the serious risks and costs of obtaining immediate finality.

Indeed, it is telling that Microsoft insists respondents have interfered with the Rule's "compromise" but not its *text*. There is nothing in Rule 23(f)'s plain language that restricts a plaintiff's right to dismiss claims with prejudice to create finality; it simply governs the narrow question addressed by the Rule itself: whether a party (without *any* commitment to abandon a case going forward) can seek immediate review of an adverse interlocutory class ruling.

Nor can Microsoft cite any authority for the odd proposition that Rule 23(f) somehow excised final decisions from Section 1291's scope. The three decisions Microsoft invoked hardly help it; those cases addressed

the converse question, *i.e.*, whether nonfinal orders should nonetheless be viewed as "final decisions" despite the availability of alternative methods of review.[19] Here, because the district court's judgment terminated the entire action, there was no need to expand the definition of finality or create an exception to invoke appellate jurisdiction.

b. Microsoft is also incorrect that respondents' final judgment appeal interferes with Rule 23(f)'s policy. It is true that interlocutory appeals may "disrupt ongoing trial court proceedings and squander resources." *In re D.C. Water & Sewer Auth.*, 561 F.3d 494, 497 (D.C. Cir. 2009). But a voluntary dismissal with prejudice terminates the case; the subsequent appeal will not disrupt any "ongoing proceedings," because there *are* no ongoing proceedings.

In sum, there is simply no basis for thinking that Rule 23(f)'s existence casts any doubt on the propriety of an appeal following a voluntary dismissal. Far from it, the Advisory Committee was aware of manufactured finality as another option for obtaining appellate review.

---

[19] See Pet. Br. 29-30; *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 103 (2009) (considering "whether disclosure orders adverse to the attorney-client privilege" satisfy the collateral order doctrine); *Swint* v. *Chambers Cty. Comm'n*, 514 U.S. 35, 38, 43, 48 (1995) (holding court lacked appellate jurisdiction over the denial of a defendant's motion for summary judgment, and rejecting the appellant's request for "expansion of appellate jurisdiction"); *Dig. Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 865 (1994) (holding "that an order denying effect to a settlement agreement" did not satisfy the collateral order doctrine where it did not resolve "the underlying cause of action").

In its 1996 report to the Committee, for example, the Federal Judicial Center cited *Gary Plastic Packing Corp.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (1990), for the proposition that a "class representative's failure to prosecute its individual claims created a final judgment; denial of class certification merged into that judgment."[20] Yet there is no hint in the rule's text or notes disapproving of this "tactic" or suggesting that Rule 23(f) was somehow intended to prohibit it.[21]

## II. MICROSOFT'S POSITION REGARDING 28 U.S.C. 1291 IS PREDICATED ENTIRELY ON POLICY ARGUMENTS THAT ARE MISGUIDED AND MISDIRECTED

Unable to root its submission in legal doctrine, Microsoft resorts to naked policy arguments in an attempt to divest the appellate courts of jurisdiction over voluntary dismissals with prejudice. As explained next, those arguments are misguided and misdirected.

---

[20] Thomas E. Willging et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 83 n.310 (Federal Judicial Center 1996).

[21] Indeed, the underlying certification dispute here illustrates the limits of Rule 23(f)'s utility. Notwithstanding that the Ninth Circuit denied respondents' petition for permission to appeal, J.A. 121, the same court ultimately reversed the certification denial, Pet. App. 19a. If a plaintiff believes strongly enough in his certification position and is willing to risk his individual claim to prove it, there is no reason to believe that Rule 23(f) was intended to block that avenue of appeal.

### A. The Legal System Has Clear, Built-in Protections That Limit Any Abuse Of Voluntary Dismissals With Prejudice

The thrust of Microsoft's position is that a voluntary dismissal with prejudice carries all the same risks of the "death knell" doctrine and other interlocutory appeals. But that ignores fundamental differences between the two devices, differences that are fatal to Microsoft's position.

Microsoft contends that respondents' position would lead to an "onslaught" of interlocutory appeals of "'discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits.'" Pet. Br. 21 (citation omitted); see *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 470, 474. Not so.

Microsoft fails to appreciate the crucial difference between the typical interlocutory appeal and a voluntary dismissal with prejudice. In the former context (including "death knell" appeals), appealing is a costless, no-lose proposition. Regardless of the outcome on appeal, the underlying claims may proceed. By contrast, if a plaintiff loses on appeal of a voluntary dismissal with prejudice, his claims are gone forever. For several reasons, plaintiffs will not cavalierly take that risk.[22]

---

[22] Microsoft downplays the significance of a voluntary dismissal *with prejudice* by insisting that its consequence is no different from a pre-*Livesay* "death knell" appeal, because judicial estoppel prevented a "death knell" plaintiff from proceeding on her individual claims should the adverse certification decision be upheld. Pet. Br. 21-22. As explained herein, however, that argument is untenable.

First, most appeals lose. This alone will minimize the number of plaintiffs who will abandon their entire action to obtain review of an adverse interlocutory ruling. It simply blinks at reality to think that attorneys—at least those who do not want to lose malpractice suits—will respond to every minor setback in litigation by staking their clients' cases on dismissals with prejudice and hopeful appeals. Few will court that risk unless the adverse ruling was truly devastating to the ultimate prospect for relief.

Second, appeals take money and time, neither of which a plaintiff is eager to spend. This, after all, is the plaintiff's suit; he is the one who has been injured and thus suffers most distinctly from any delay, and he will continue to suffer while the appeal is pending. The average appeal could easily delay the entire suit for years over a single issue.[23] Again, unless that issue is truly mission-critical, few rational litigants would accept this considerable obstacle to pursuing relief.

Third, the preceding two points provide even greater deterrents to those plaintiffs who might be tempted to interrupt their suits to complain about the myriad nonfinal rulings that are subject to harmless-error review. See 28 U.S.C. 2111; cf. *Livesay*, 437 U.S. at 472 (expressing concern over "consequences of applying

---

[23] For example, in 2015, the median length of time from notice of appeal to final disposition ranged from 5 months (Eighth Circuit) to 14.3 months (Ninth Circuit). 2015 Federal Court Management Statistics Report, available at http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-december-2015.

these ['death knell'] tests to pretrial orders entered in non-class-action litigation").

Appellate jurisdiction does not mean appellate victory, and, given that a plaintiff is risking his entire case on winning the appeal, it is the odds of the latter that will largely determine the frequency of appeals. Importantly, reversal on appeal is warranted not for any error, but only for errors with unfair consequences, *i.e.*, errors that impair substantial rights. See 28 U.S.C. 2111. Unlike the denial of class certification, however, most interlocutory orders in civil cases do not by themselves "affect the substantial rights of the parties," *id.*, which means that the appellant will generally bear the burden of showing that the complained-of error substantially influenced the outcome. See, *e.g.*, *Shinseki* v. *Sanders*, 556 U.S. 396, 407 (2009); *Matusick* v. *Erie Cty. Water Auth.*, 757 F.3d 31, 50 (2d Cir. 2014) (citing *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946)).[24]

For the vast majority of interlocutory orders, it will be all but impossible for the appellant to carry that burden. See, *e.g.*, Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error*, 25 Loy. L.A. L. Rev. 893 (1992) (concluding that, even after

---

[24] An improper denial of class certification is reversible error without any additional showing. Cf., *e.g.*, *Costello* v. *BeavEx, Inc.*, 810 F.3d 1045, 1061 (7th Cir. 2016) (vacating the denial of class certification without mentioning harmless-error standard). It is plain that the denial of class certification impairs substantial rights under Section 2111's standard: the influence of an order denying certification is not merely "substantial," *Kotteakos*, 328 U.S. at 765; it is dispositive. After denial, the class claims have *no* chance of success because they cease to exist.

trial, fewer than 30 out of 20,000 appellants obtained reversal in 1990 based upon evidentiary error).[25]

Put simply, most voluntary dismissals would easily fail harmless error review, meaning fewer still plaintiffs will use dismissal to trigger an appeal.

### B. Microsoft's Position Would Frustrate The Efficient Resolution Of Disputes

Microsoft offers a host of other erroneous arguments that a voluntary dismissal will interfere with the proper functioning of the judiciary. But, in truth, it is Microsoft's position that threatens the efficient administration of justice.

1. Microsoft's core policy objection relates to judicial efficiency, insisting that Respondents' position will increase the judiciary's workload by "virtually guarantee[ing] piecemeal appellate review." Pet. Br. 23; see *Livesay*, 437 U.S. at 471. But concern about judicial workload actually cuts in favor of respondents. Unlike an interlocutory appeal, a dismissal with prejudice terminates the trial court proceedings. That leaves two possibilities for the fate of the case, both of which

---

[25] If, for example, one immediately dismisses his case after an adverse evidentiary ruling, the truncated record will make it difficult for an appellant to show that a substantial right was impaired. Cf., *e.g.*, *Morrison Knudsen Corp.* v. *Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1239 (10th Cir. 1999) (explaining that the "risk of doubt" as to showing prejudice on a sparse record must lie with the appellant); *Flores* v. *Cabot Corp.*, 604 F.2d 385, 386 (5th Cir. 1979) (per curiam) (holding that "[w]e cannot determine on the record before us whether the plaintiff's case was materially prejudiced").

conserve judicial resources compared to Microsoft's scheme.

Possibility one is that the voluntary-dismissal plaintiff loses. That means the case is over; it will never clog the district court's docket and waste the judge's, jury's, and parties' time with a trial nobody wants. Possibility two is that the voluntary-dismissal plaintiff wins, creating certainty about the certification issue that in turn ensures that the parties subsequently litigate the merits with the appropriate attention and resources.

Consider instead the world under the rule Microsoft envisions. Imagine a stubborn or irrational plaintiff with a small dollar claim who refuses to give up and wins his trial. That plaintiff will certainly appeal the certification denial, but if he wins the appeal, he may face yet another procedural obstacle: a retrial of the merits on a classwide basis (on the theory that it would be unfair to the defendant to use the individual, small-dollar verdict as the basis for massive classwide relief). See Note, *Interlocutory Appeal From Orders Striking Class Action Allegations*, 70 Colum. L. Rev. 1292, 1293-1294 (1970) (discussing reasons why a court might order retrial and other issues). In that scenario, Microsoft's approach is spectacularly wasteful. It requires *two* trials; in contrast, the voluntary dismissal approach requires either one trial (if the post-dismissal certification appeal is successful) or no trial (if the post-dismissal certification appeal loses).

Things do not improve if the parties believe that a new, post-certification trial will *not* be ordered, *i.e.*, if the sole individual trial will also determine the class's relief. There, any case with significant classwide exposure will

have to be litigated *as if* a fortune is at stake. Millions of dollars (and countless hours of judiciary and party time) will be consumed in ways that ultimately no rational person would endorse.[25]

In sum, the only realistic way that Microsoft's position truly spares any resources is if plaintiffs throw in the towel. So, yes: the judiciary will save time and effort if plaintiffs—discouraged by the prospect of having to pursue a paltry individual sum for the bare opportunity of seeking review—simply give up. But those judicial "savings" come at the serious and illegitimate cost of forcing individuals to abandon statutory rights and acquiesce in significant aggregate social harm.

2. Microsoft also expresses concern about the proper allocation of duties between appellate and trial judges, suggesting that Respondents' position will "disrupt[] the proper balance between district and

---

[25] Microsoft argues that a voluntary dismissal might force an appellate court to decide a difficult class-certification issue that could otherwise be avoided if the plaintiff loses on the merits of his individual claim. Pet. Br. 27-28. But that objection produces at most a wash: in some cases, the merits question might well be even more complicated than the certification issue; affirmance on certification would obviate the necessity of considering the merits; and the parties could settle either way. To be sure, the appeals court might reverse on adequacy and the trial court might then still deny certification on other grounds, leaving the plaintiff again in the position of seeking review of that subsequent denial. Cf. *Livesay*, 437 U.S. at 474. But the streamlined voluntary-dismissal procedure still avoids the costs associated with that repetition.

appellate courts." Pet. Br. 14; see *id.* at 27-28; *Livesay*, 437 U.S. at 476. Microsoft's concern is unwarranted.

Because interlocutory appeals spring from pending cases that will survive the appeal, there is no risk to appealing every issue; the case goes on either way. The menace of risk-free appeal can threaten the trial judge's control of the proceeding and undermine her ability to render decisions that command respect from the parties. But there is no analog here. A plaintiff considering a voluntary dismissal will have to weigh carefully the likelihood of success on appeal before he questions a district court's decision, and the harmless error doctrine makes it particularly unlikely that a plaintiff will routinely feel comfortable staking his entire lawsuit on the success of an appeal.

3. Microsoft's suggested rule also pays insufficient heed to the point of class actions. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997) (citation and internal quotation marks omitted).

Tellingly, Microsoft never admits the obvious upshot of its position: if most parties are required to litigate a full trial—despite having no desire to litigate individually—the vast majority of cases involving small-value claims will simply *disappear* after an adverse class certification ruling. The relevant threat to the court system is thus not piecemeal review, but *no review at all.* Microsoft cannot seriously deny that some disputes are so costly to litigate "that only a lunatic or a fanatic"

would pursue them individually. *Carnegie* v. *Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.). To require unsuccessful class plaintiffs to act irrationally—to pay for a seven-figure trial of a seven-dollar claim—merely to exercise their appeal rights makes no sense. It would mean that defendants would win cases (including some wrongly decided) without ever facing an appeal, because the plaintiffs simply give up.

It is hardly consistent with effective judicial administration to immunize legal violations from review in this fashion. To the contrary, Microsoft's position impedes the legislative objective of punishing wrongdoers even where claims have only minimal value. While each individual claim may be insignificant on its own, the aggregate harm imposed by defendants' behavior is staggering. There is an obvious interest in reading Section 1291 to mean what it says and preserve the practical ability of litigants to assert their rights.

4. Microsoft's final policy point again misapprehends *Livesay*, asserting that, like the "death knell" doctrine, the voluntary dismissal here "'operates only in favor of plaintiffs.'" Pet. Br. 28 (quoting *Livesay*, 437 U.S. at 476). But there is no conceptual overlap, of course, between *what* is final and *who* may benefit from it. In any event, as applied to class situations, this consequence merely puts a plaintiff on equal footing with a defendant.

Microsoft wants to leave the prospect of appellate review only to a plaintiff who is rich enough or, in Judge Posner's colorful terms, "lunatic" enough to spend a fortune to recover a farthing in the hopes of overturning certification denial. But, as discussed above, even that plaintiff may have to litigate the merits a second time if

the defendant can convince the trial court to grant retrial. The voluntary-dismissal device efficiently short-circuits that process, and will also benefit defendants, who should value certainty about the class issue just as much as plaintiffs. See *Livesay*, 437 U.S. at 476.

### C. In Any Event, Microsoft's Attempt To "Refine When A District Court Ruling Is 'Final'" Should Be Addressed Through Rulemaking

As explained above Microsoft's policy arguments are misguided. They are also misdirected.

The definition of finality and the propriety of interlocutory appeals are areas where this Court has expressed particular solicitude for the rulemaking process. The Court made clear in *Swint* v. *Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995), that "rulemaking under § 2072" is the appropriate procedure "to clarify when a decision qualifies as 'final' and when an interlocutory order is appealable." *Ibid.*

This is especially true given the nature of Microsoft's request here. It is far from clear that Congress—in passing Section 2072(c)—intended to provide any authority to revisit the long-settled understanding that the term "final decisions" in 28 U.S.C. 1291 extends to all final judgments.[27]

---

[27] To the contrary, it seems likely that Congress was merely authorizing rulemakers to define when a *prejudgment* ruling of a district court is final for purposes of 28 U.S.C. 1291. See pp. 5-6, *supra* (explaining the genesis of 28 U.S.C. 2072(c)). Indeed, the notion that a case-closing final judgment is always a final decision for purposes of 28 U.S.C. 1291 has been settled law for decades. See, e.g., *Abney* v. *United States*, 431 U.S. 651, 658 (1977) ("*While a final*

If it did, however, such a significant policy-shift would be a paradigmatic example of the type of "value judgments" that are "better left to the 'collective experience of bench and bar' and the 'opportunity for full airing' that rulemaking provides." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 118-119 (2009) (Thomas, J., concurring) (quoting the majority opinion).

## III. THERE WAS NO ARTICLE III OBSTACLE PREVENTING NINTH CIRCUIT REVIEW OF THE ORDER STRIKING CLASS ALLEGATIONS

### A. Respondents' Individual Claims Were Impaired By The Class Order, And Respondents Expressly Reserved Their Rights To Challenge That Impairment

Microsoft maintains that Article III bars appellate jurisdiction because the case is moot. According to Microsoft, respondents voluntarily dismissed their own claims and thus forfeited any ability to challenge that dismissal on appeal. As Microsoft understands it, a party cannot be aggrieved by an order it affirmatively requested, which eliminates any live case or controversy for a court to resolve. On multiple levels, Microsoft is mistaken.

1. As an initial matter, Microsoft is incorrect that this issue implicates any jurisdictional question at all. This is a *waiver* issue, not a *jurisdictional* issue.

---

*judgment always is a final decision*, there are instances [such as collateral orders] in which a final decision is not a final judgment.") (quoting *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J. separate opinion)) (emphasis added).

"Judgments are judgments, and any party can appeal as of right from a final decision adverse to his interests." *Downey*, 266 F.3d at 682; see also, *e.g.*, *United States* v. *Babbitt*, 104 U.S. 767 (1881). There is no question that this judgment is adverse to respondents' interests: the final judgment dismissed their claims with prejudice, and the prior class ruling merges directly into that final judgment. Even if respondents somehow abandoned their rights (which they did not), "[w]aiver affects, not a court's power to hear the case, but whether as a practical matter it has any job to do." *Downey*, 266 F.3d at 683.

And it is clear that the courts here still have a job to do, as respondents did *not* abandon their rights. In seeking a voluntary dismissal, respondents were unequivocal that the dismissal was predicated on reserving the right to challenge the court's rulings and revive their claims should they prevail on appeal.[28] This is a classic reservation of rights, and such a reservation "is incompatible with waiver." *Ibid.*[29]

---

[28] In respondents' motion to dismiss with prejudice, they explained their intent "'to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations.'" Pet. App. 39a (quoting J.A. 122-123).

[29] Microsoft argues that respondents were still responsible for the ultimate dismissal: they had the choice to litigate their individual claims, and they cannot now blame the class-certification ruling (or anyone but themselves) for seeking a voluntary dismissal. This fundamentally misunderstands the nature of respondents' decision: respondents did not move to dismiss their *original* claims, but the *impaired* version of their claims that was left after the district court struck the class allegations. That ruling left respondents with diminished rights that (as a matter of law and fact) were not the same rights asserted in the complaint. Parties are entitled to pursue

This dooms Microsoft's position: the final judgment with prejudice is adverse to respondents' interests, and their express reservation eliminates any waiver. That satisfies both Section 1291's finality requirement and Article III's justiciability requirement. Microsoft conspicuously fails to explain why this express reservation is somehow invalid. It cannot now evade appellate review over the very issues that aggrieved respondents and were expressly preserved in their voluntary dismissal.

2. In response, Microsoft argues that respondents overlook the "sturd[y]" rule that parties who voluntarily dismiss their complaints cannot later appeal: if a party "'voluntarily become[s] nonsuit, [he] cannot sue out a writ of error.'" Pet. Br. 35 (quoting *Cent. Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U.S. 24, 39 (1891), in turn citing *United States* v. *Evans*, 9 U.S. (5 Cranch) 280 (1809), and *Evans* v. *Phillips*, 17 U.S. (4 Wheat.) 73 (1817)). According to Microsoft, it is settled that parties cannot complain of dismissals they invite, and Microsoft says that Respondents' theory is at odds with that rule.

This argument supplies the core of Microsoft's position—and it rests on an unacknowledged, fatal error. Microsoft has overlooked that, in the 1800s, *voluntary*

---

an all-or-nothing approach to litigation. There is no rule of law or logic that forces a party to litigate a version of a claim it never wished to bring. The only Article III question is whether there is a final decision adverse to the party; if the party dismissed the right to pursue a weaker version of the claim but *reserved* the right to restore the original claim, there is neither a jurisdictional impediment nor waiver, and Microsoft errs in suggesting otherwise.

*nonsuits were "without prejudice." In re Skinner & Eddy Corp.*, 265 U.S. 86, 92-93 (1924) (emphasis added);[30] see also, *e.g.*, *Cent. Transp. Co.*, 139 U.S. at 39 ("'in the case of a nonsuit a new action may be brought'"); *Haldeman* v. *United States*, 91 U.S. 584, 585 (1875) ("[n]onsuits * * * do not preclude the institution and maintenance of subsequent suits"); *Chira* v. *Lockheed Aircraft Corp.*, 634 F.2d 664, 665 n.7 (2d Cir. 1980) ("The dismissal available at common law was without prejudice.").[31] A dismissal without prejudice does not impair a party's Article III interests, because they can always seek the same relief again in the same forum. See, *e.g.*, *Rudolph* v. *Sensener*, 39 App. D.C. 385, 387-388 (1912) ("no appeal lies from the entry [of a

---

[30] This rule had a limited exception when "a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind." *In re Skinner & Eddy Corp.*, 265 U.S. at 93 (internal quotation marks omitted). But nothing in *Evans*, *Phillips*, or *Central Transportation* suggests those cases turned on the exception, not the rule.

[31] In fact, the common law itself provided two different mechanisms for voluntarily dismissing actions: the nonsuit, which left the plaintiff free to refile, and the "retraxit," which did not. In Blackstone's words as relayed by this Court, "[t]he nonsuit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open, voluntary renunciation of his claim in court, and by this he forever loses his action." *United States* v. *Parker*, 120 U.S. 89, 95 (1887) (quoting 3 Comm. 296); see also, *e.g.*, *Haldeman* v. *United States*, 91 U.S. at 585 (distinguishing a nonsuit from a *retraxit*, and holding that a judgment stating "that the said suit is not prosecuted, and be dismissed" was a nonsuit and not a *retraxit*, meaning the party did not "forever los[e] their action").

nonsuit] because the action may be brought anew") (citing *Cent. Transp. Co.*, 139 U.S. at 39). That factor, and not the *voluntary* component, is what drove those decisions.[32]

Respondents' case falls in a distinct category. This final judgment was entered *with* prejudice. It captured (via merger) an interlocutory ruling that was devastating to respondents' legal rights and their practical ability to pursue their claims. That is sufficient to preserve Article III jurisdiction.

Indeed, this case aligns perfectly with *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), a case that Microsoft misreads. In *Procter & Gamble*, the Court permitted the government to appeal from a judgment it directly invited in order to challenge an interlocutory discovery order. 356 U.S. at 678-679. The government might have pursued other means of challenging the order, and nothing suggests the order prevented the government from litigating the case to final judgment. But the Court allowed the appeal anyway (without any Article III obstacle), because the government had "at all times opposed the production orders" and invited the dismissal sanction as a "way of getting review of the adverse ruling." *Id.* at 680; see also, *e.g.*, *OFS Fitel, LLC*

---

[32] Microsoft makes the same mistake in relying on *Kelly* v. *Great Atl. & Pac. Tea Co.*, 86 F.2d 296 (4th Cir. 1936), quoting the Fourth Circuit's declaration that "it is well settled in the federal courts that no appeal lies from a judgment of voluntary nonsuit." Pet. Br. 35 (quoting 86 F.2d at 297). Again, Microsoft ignores the context: *Kelly* confirmed that a nonsuit leaves a "plaintiff at liberty to commence another action for the same cause." 86 F.2d at 297.

v. *Epstein, Becker, and Green, P.C.*, 549 F.3d 1344, 1353 (11th Cir. 2008) (adopting this understanding of *Procter & Gamble*).

Just as the government was permitted to challenge the interlocutory ruling—and preserve its claims—respondents are entitled to do so here.

3. Finally, Microsoft argues that a voluntary dismissal survives Article III only where a prior order "effectively decides the plaintiff's claim on the merits." Pet. Br. 37. But this was surely untrue in *Procter & Gamble*, where the prior order involved *discovery*, not the merits. To be clear: it was only the government's *invitation to dismiss* (as a proposed sanction) that prompted the ultimate judgment. 356 U.S. at 679-680; contra Pet. Br. 37 (incorrectly suggesting the court *initially* ordered compliance "on pain of dismissal," rather than at the government's urging).

In fact, Microsoft's position only proves *Respondents'* point. There is no rule of Article III that restricts live controversies to those that *destroy*, rather than *impair*, an interest.[8] What matters is that parties disagree over

---

[8] The striking of the class allegations both legally and practically impairs respondents' claims. As a legal matter, the stricken class claims permit added recovery: the adverse order deprived respondents of the right to seek incentive awards and attorney's fees, and it eliminated their right to spread costs among the full class. As a practical matter, it destroyed the proceeding entirely. A small value claim is effectively worthless outside the class context: only a zealot or a lunatic engages in extensive complex litigation over a $30 claim. Without the prospect of class proceedings, no one invests the resources to prove a claim worth substantially less than the cost of litigation.

a concrete and particularized legal issue. It is not difficult to identify the concrete and particularized issue dividing the parties here.

Indeed, this Court implicitly recognized as much in *Gabelli* v. *SEC*, 133 S. Ct. 1216 (2013). In Gabelli, the SEC asserted three claims in its complaint. *SEC* v. *Gabelli*, 653 F.3d 49, 55 (2d. Cir. 2011). The district court dismissed the first two claims and significantly limited the remedies available for the third. *Id.* at 56. Such an order was obviously interlocutory: the third claim remained live, albeit with limited remedies. But the SEC, "believing that [the remaining remedy] would not provide significant relief," voluntarily dismissed the third claim and sought to reserve the ability to re-assert that claim upon remand if it were successful in its appeal. *Ibid.*

The Second Circuit expressly considered its jurisdiction over the appeal and held that the judgment was final. *Ibid.* It went on to hold that the district court erred in dismissing the first two claims, *id.* at 57-58, and erred in limiting the remedies available for the third claim, *id.* at 61. This Court granted certiorari on a remedial question pertaining to the third claim. 133 S. Ct. 97. At no point did the Court question the propriety of the Second Circuit's jurisdiction.

### B. Even If The Voluntary Dismissal In This Case Did Moot Respondents' Individual Claims, It Did Not Moot The Lawsuit

According to Microsoft, an Article III problem arises if a successful appeal on the class question would not revive the respondents' individual claims. If the respondents are forbidden from ever obtaining their

individual damages, Microsoft argues, they have lost any "personal stake" in the litigation, and thus have no Article III standing to bring an appeal.

Microsoft is wrong. Respondents have two distinct interests in obtaining reversal of the district court's decision: a personal economic stake and a noneconomic procedural interest. These are both entirely distinct from respondents' ability to recover their individual damages, and under this Court's established precedent, either one of these interests is sufficient to satisfy Article III.[34] Respondents' economic stake in the appeal is their potential ability to obtain an incentive reward if the class were ultimately successful. Their non-economic stake is their procedural interest in having the class certified.

---

[34] Microsoft contends that respondents have "'forfeited' the right to make any argument now predicated on their proposed class representation." Pet. Br. 39. But respondents' stipulation reserved all their rights without expressly disclaiming anything. Microsoft cannot seriously contend that respondents have waived arguments they had no occasion to make: the Ninth Circuit, correctly, upheld their ability to appeal, and the Ninth Circuit upheld respondents' full rights (as individuals and class members) at every stage of the appeal. There was thus no reason for respondents to assert a lesser interest. Should the Court conclude that respondents somehow lost their individualized rights, they will then be in a positon to assert other rights associated with their representation of the class. But Microsoft is simply wrong that respondents failed to preserve an issue that was not squarely presented in light of the current posture of this case.

### 1. *Under* Deposit Guaranty National Bank v. Roper, *445 U.S. 326 (1980), respondents have an economic interest in class certification that satisfies Article III*

In *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), this Court held without qualification that a named plaintiff in a class action could appeal an adverse class certification ruling even though his individual entitlement to damages would be unaffected by the disposition of the appeal.

The plaintiffs in *Roper* sought to bring a class action on behalf of 90,000 Mississippi credit card holders who had been charged illegal interest rates. *Roper*, 445 U.S. at 328. The district court denied class certification and the Fifth Circuit denied the plaintiffs' motion for interlocutory appeal. *Roper*, 445 U.S. at 329. The defendant "then tendered to each named plaintiff * * * the maximum amount that each could have recovered * * *, including legal interest and court costs." *Id.* at 329. The plaintiffs refused the offer, but the district court nonetheless entered judgment in the plaintiffs' favor, took the money into the court registry, and dismissed the case. *Id.* at 330.

Rejecting the argument that the plaintiffs lacked a personal stake in the appeal, the Court held that the named plaintiffs' "*individual* interest in the litigation * * * is sufficient to permit their appeal of the adverse certification ruling." *Id.* at 340. But the Court did not rest its holding on the plaintiffs' ability to recover their individual damages.

Rather, the Court found the possibility that the plaintiffs might "shift to successful class litigants a

portion of those fees and expenses that have been incurred" to be enough of a personal economic stake to satisfy Article III. See *Id.* at 334 n.6; see also *id.* at 336-337 (explaining that "[f]ederal appellate jurisdiction is limited by the appellant's personal stake in the appeal[, and identifying such interest as the plaintiffs'] desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails").

Like the plaintiffs in *Roper*, the respondents' interest in the lawsuit is not limited to their individual entitlement to damages. As a result, even if respondents have lost the ability to recover those individual damages, they retain an economic incentive to obtain reversal of the district court's erroneous decision to strike respondents' class allegations. Specifically, respondents may eventually obtain an "incentive reward" for winning efforts.

As Judge Posner recently explained, named plaintiffs who have settled their individual claims may be eligible for an "incentive reward * * * for their services as the class representatives." *Espenscheid* v. *DirectSat USA, LLC*, 688 F.3d 872, 874 (7th Cir. 2012). Like the plaintiffs in *Espenscheid*, respondents here may be able to obtain an incentive reward if the class action is ultimately successful against Microsoft.[35] And "the prospect of such

---

[35] To be sure, an incentive award will depend on the class eventually being certified (and some class recovery), but every aspect of litigation is speculative or "probablistic rather than certain." *Espenscheid*, 688 F.3d at 875. Incentive awards are calculated within the discretion of the district court, see *In re Mego*

a payment, though probabilistic rather than certain, suffices to confer standing." 688 F.3d at 875.

This is because the potential incentive reward is an economic stake that is separate from the damages award. See *Espenscheid*, 688 F.3d at 875 (acknowledging that settlement means that named plaintiff "will no longer have a stake in any damages that may be awarded to the class" but concluding that named plaintiff has standing to appeal adverse class certification decision).

Microsoft theorizes that *Roper* does not apply because respondents' claims here were not dismissed "against their will or even by happenstance." Pet. Br. 40. It is true that this Court in *Roper* said that the "factual context," meaning the plaintiffs' opposition to the entry of judgment in that case, was "important." 445 U.S. at 332. And indeed this Court even invoked "settlement of all personal claims" as an example of a situation in which

---

*Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000), and there is nothing to suggest that dismissal of respondents' individual claims would preclude an award. To the contrary, the relevant factors suggest that respondents' willingness to sacrifice their own claims for the benefit of the class would weigh in favor of an award. See *Pelletz* v. *Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329 (W.D. Wash. 2009) ("The criteria that courts have used in considering the propriety and amount of an incentive award include: (1) the risk to the class representative in commencing a class action, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation.").

the court loses "jurisdiction over the controversy of the individual plaintiffs." 445 U.S at 332.

In its reply, Microsoft will undoubtedly attempt to make hay out of language such as this. But the reasoning in *Roper* had nothing to do with the involuntary nature of the dismissal in that case. See *Richards* v. *Delta Air Lines, Inc.*, 453 F.3d 525, 528-529 (D.C. Cir. 2006) (reaching same conclusion). Instead, it rested on the Court concluding that there was and is a distinction between a plaintiff's ability to appeal the lower court's disposition of his individual claims and his ability to appeal the lower court's disposition of the class allegations. *Id.* at 336-337. So too here.

Microsoft also claims that respondents' voluntary dismissal deprives them of the ability to make an "argument for spreading attorney's fees or costs." Pet. Br. 40. Microsoft again misses the point of *Roper*: where a named plaintiff has an economic stake—even a speculative and/or modest one—in the success of an appeal, the named plaintiff has a sufficient personal stake to satisfy Article III. Respondents here indisputably have such a personal economic interest: the possibility of an incentive reward.

### 2. *Respondents also have the same noneconomic interest in obtaining class certification that was endorsed by* United States Parole Commission v. Geraghty, *445 U.S. 388 (1980)*

Independent of their economic stake in the lawsuit, respondents have a representational stake in the appeal that satisfies Article III. This Court in *Roper* recognized that named plaintiffs in a class action have a "responsibility to represent the collective interests of the

putative class" that is separate from their "private interest" in the lawsuit. *Roper*, 445 U.S. at 331-332.

In *Roper*, the plaintiffs' economic interest in the outcome of the appeal permitted the Court to find Article III satisfied solely on the basis of the named plaintiffs' "private interests." 445 U.S. at 332. But it is clear from *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), decided the same day as *Roper*, that even where a private economic interest no longer exists, a named plaintiff may pursue an appeal of an adverse class determination.

In *Geraghty*, prisoner John Geraghty brought a class action challenging the federal parole release guidelines. *Geraghty*, 445 U.S. at 393. The district court denied class certification. *Ibid.* During the pendency of his appeal, Geraghty was released from prison. *Id.* at 394. And Geraghty did not claim to have any personal economic stake in the litigation. As a result, Geraghty's "personal claim [had] become 'moot.'" *Id.* at 390.

Nonetheless, the Court found Article III satisfied, on the ground that Geraghty possessed a personal *non-economic* stake in vindicating his procedural "right" to obtain class certification. *Id.* at 402. The Court distinguished between the named plaintiff's interest in his own claim for relief and the named plaintiff's interest in class certification: "A plaintiff who brings a class action presents two separate issues for judicial resolution. One is a claim on the merits; the other is the claim that he is entitled to represent a class." *Ibid.*

The mooting by expiration of the plaintiff's personal claim did not rob the named plaintiff of standing to pursue the class certification claim. To the contrary, the

Court held that the requirements of Article III were satisfied "with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits" was gone and beyond revival. *Geraghty*, 445 U.S. at 404. If we assume respondents' individual claims here are truly moot, like in *Geraghty*, the fact that the mootness here arose for a different reason than in *Geraghty* does not alter the basic lesson of that case, which is that a named plaintiff's personal claims on the merits do not constitute his sole cognizable interest in class litigation. Indeed, the respondents here have an even a stronger representational claim than *Geraghty* did, because they were willing to risk their own entitlement to damages in order to obtain an immediate appeal of the district court's order striking class allegations from their complaint. The lawsuit is therefore not moot.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

BRENDAN S. MAHER
*Counsel of Record*
DANIEL L. GEYSER
DOUGLAS D. GEYSER
Stris & Maher LLP
6688 N. Central Expy., Ste. 1650
Dallas, TX 75206
(213) 995-6805
*brendan.maher@strismaher.com*

SHAUN P. MARTIN
University of San Diego
School of Law
5998 Alcalá Park
San Diego, CA 92110

ROBERT L. ESENSTEN
Esensten Law
12100 Wilshire Blvd., Ste. 1660
Los Angeles, CA 90025

JEFFREY M. OSTROW
JONATHAN M. STREISFELD
Kopelowitz Ostrow Ferguson
Weiselberg Gilbert P.A.
1 West Las Olas Blvd., Ste. 500
Fort Lauderdale, FL 33301

PETER K. STRIS
RADHA A. PATHAK
DANA BERKOWITZ
VICTOR O'CONNELL
THOMAS E. LOGAN
Stris & Maher LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017

DARREN T. KAPLAN
Stueve Siegel Hanson LLP
1359 Broadway, Ste. 2001
New York, NY 10018

MARK A. GRIFFIN
AMY WILLIAMS-DERRY
BENJAMIN GOULD
Keller Rohrback LLP
1201 Third Ave., Ste. 3200
Seattle, WA 98101

PAUL L. STRITMATTER
BRADLEY J. MOORE
Stritmatter Kessler Whelan
Koehler Moore Kahler
200 Second Ave. West
Seattle, WA 98119